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83-784
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUFFALO FORGE COMPANY, AMPCO-PITTSBURGH CORPORATION AND AMPCO-PITTSBURGH SECURITIES II CORPORATION,
Petitioners,

—against—

OGDEN CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

This case presents a direct conflict between the Second and Sixth Circuits with respect to whether a "lock-up"—corporate management's sale of treasury stock to a competing tender offeror, in order to promote the success of his bid—can be a "manipulative act" forbidden by Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). In *Mobil Corp.* v. *Marathon Oil Co.*, 669 F.2d 366 (1981), the Sixth Circuit held that, under certain circumstances, a lock-up can violate Section 14(e); the Second Circuit here held that, as a matter of law, a lock-up can never violate Section 14(e).

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Second Circuit are those listed in the caption of this Petition and David R. Newcomb, Raymond J. Popp, Thomas W. Burke, Edward W. Duffy, John H. Gregory and Frederick S. Pierce.*

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* A list of the affiliates of Buffalo Forge Company and Ampco-Pittsburgh Corporation is annexed hereto as Appendix A.

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Petitioners,

—against—

OGDEN CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Buffalo Forge Company ("Buffalo Forge"), Ampco-Pittsburgh Corporation and Ampco-Pittsburgh Securities II Corporation (collectively, "Ampco") ask that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit, entered in this case on September 22, 1983.

Opinions Below

The memorandum opinion of the Court of Appeals, not officially reported, is annexed hereto as Appendix B. The opinion of the United States District Court for the Western District of New York (Curtin, J.), reported at 555 F. Supp. 892, is annexed hereto as Appendix C.

Jurisdiction

The judgment of the Court of Appeals was entered on September 22, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 15 U.S.C. § 78aa, and the doctrine of pendent jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Statute Involved

Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), provides, in pertinent part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

Statement of the Case

The Tender Offer Competition For Buffalo Forge

On January 7, 1981, Ampco made a tender offer for any and all of Buffalo Forge's stock at a price of $25 per share. The offer was vigorously opposed by Buffalo Forge's management and board of directors, who commenced litigation in an attempt to stop the offer. *See*, *Buffalo Forge Co.* v. *Ampco-Pittsburgh Corp.*, 638 F.2d 568 (2nd Cir. 1981). They also began to seek a "white knight" to make a competing bid.

Eventually, a "white knight" materialized in the form of Ogden Corporation ("Ogden"), a large diversified company which agreed to acquire Buffalo Forge by offering Buffalo Forge's shareholders Ogden stock on a share-for-share basis. Ogden's stock was then selling at $32.75 per share.

As part of this arrangement, Buffalo Forge sold to Ogden 425,000 shares of its treasury stock, and granted Ogden a one-year option to acquire an additional 143,400 treasury shares all at a price of $32.75 per share. Ogden, however, did not pay cash for the 425,000 shares it bought. Instead, it gave Buffalo Forge a ten-year, non-amortizing promissory note, bearing interest at 9%—a full 10.5% below the then prime rate. The option called for payment with a similar promissory note.

The sale and option covered a total of 21% of Buffalo Forge's outstanding stock. The purpose was plainly and simply to enable Ogden to "lock up" Buffalo Forge and to exclude all other bidders: Ogden's chairman candidly admitted that he wanted a deal that would "lock up the treasury stock" and "might cause everybody (*i.e.*, Ampco or any other bidder) to go away." And Ogden's vice president and counsel testified that, "It was our intent . . . to structure a transaction to avoid a bidding contest . . . ."

The lock-up worked in two ways: First, the sale and optioning of the treasury shares made Buffalo Forge substantially more expensive for any other bidder because it would have to purchase 21% more stock than Ogden. Following the lock-up, there were really two Buffalo Forges: Ogden's target, which had 2.1 million shares outstanding, and everyone else's target, which had more than 2.6 million shares. In Ampco's case, for instance, the issuance of the 568,400 treasury shares instantly increased the cost of its $25 per share offer by $14,210,000. And the value of the Buffalo Forge assets would not be increased commensurately by receipt of the Ogden notes—a ten-year non-amortizing note at less than half the prime rate is worth nothing like its face.

Second, Ogden's acquisition of the Buffalo Forge treasury stock went a long way toward insuring a favorable shareholder vote on the proposed Ogden-Buffalo Forge merger agreement, which required two-thirds approval under New York law—with 21% of the stock locked up, Ogden could accomplish a merger by acquiring only 46% of the stock in a free market. Put another way, what was once 33.4% of Buffalo Forge's stock was diluted by the treasury stock sale to 26.4%—well below the percentage required to defeat the merger.

Thus the plain and admitted purpose of the lock-up was "to avoid a bidding contest"—in other words, to rig or "manipulate" the market so that the Ogden bid would succeed.

In any event, Ogden did not succeed. Ampco raised its bid to $37.50 cash, Ogden dropped out of the competition, and Ampco acquired Buffalo Forge. Ogden did, however, exercise its option and then tendered all of its Buffalo Forge stock to Ampco, seeking $37.50 per share. Ampco announced that it would not pay for Ogden's shares until the validity of the treasury stock sale was judicially determined.

Proceedings Below

The District Court

In the District Court, Ampco relied on the Sixth Circuit's decision in *Mobil Corp.* v. *Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), and argued that the sale and optioning of Buffalo Forge's treasury stock was a "manipulative act or practice" violative of Section 14(e).* Ogden counterclaimed for the $37.50 price of the shares it had tendered to Ampco, and for unpaid dividends.

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* The proceedings below also included state law claims against Buffalo Forge's directors for breach of fiduciary duty. Ampco had initially brought suit individually and derivatively in right of Buffalo Forge before it acquired control of the latter. After Ampco obtained control of Buffalo Forge a motion was made to realign the parties and to amend the pleadings. The motion was granted and Buffalo Forge assumed prosecution of the derivative claims in its own right.

The District Court refused to apply *Mobil*. It granted Ogden judgment on its counterclaim in the amount of $24,598,272.15.

The Court of Appeals

The Second Circuit affirmed. It declined to follow *Mobil*, characterizing it as "an unwarranted extension of the Williams Act." The Second Circuit held that, as a matter of law, the Williams Act was solely a disclosure statute that did not reach substantive conduct regardless of whether that conduct "manipulated" the price or outcome in a bidding contest.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts Directly With A Decision of the Sixth Circuit and Is Predicated Upon a Basic Error of Law

The decision below is in direct conflict with the Sixth Circuit's decision in *Mobil*. In the latter case, target Marathon management, attempting to stave off a takeover bid by Mobil, accepted a proposal at $125 per share by white knight U.S. Steel. As a condition of its offer, Steel demanded and received an option to purchase ten million shares of Marathon's authorized but unissued stock (about 17% of the shares outstanding) for $90 per share, and a second option to purchase Marathon's 48% interest in the Yates oil field at a price which Mobil contended was inadequate. The latter option would be exercisable only if Steel's offer was unsuccessful and a third party gained control of Marathon. Mobil sued to invalidate both options.

The district court denied a preliminary injunction restraining exercise of the options. But the Sixth Circuit reversed, ruling that the stratagems devised by the Marathon-Steel lawyers and investment bankers were "manipulative" within the meaning of Section 14(e) of the Williams Act. Noting that such options were "relatively new to the world of tender offer take-over contests," the Sixth Circuit said:

> . . . courts have recognized that the term "manipulative" must remain flexible in the face of new techniques which artificially affect securities markets. "No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices." [citing *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977).] 669 F.2d at 374.

The Sixth Circuit ruled that Steel's attempted lock-up was such an ingenious device:

> In our view, it is difficult to conceive of a more effective and manipulative device than the "lock-up" options employed here, options which not only artificially affect, but for all practical purposes block, normal healthy market activity and, in fact, could be construed as expressly designed solely for that purpose. *Id.*

Further, the Sixth Circuit deemed the options to be manipulative not only because of the effect they might have on the known bidder (*i.e.*, Mobil), but on *unknown* bidders as well:

> The Yates Field option and the stock option, both individually and in combination, have the effect of circumventing the natural forces of market demand in this tender offer contest. Were this contest a straight price-per-share auction, tender offers well in excess of the USS offer of $125 per share may have been forthcoming. Of course, Mobil itself has offered $126 per share, conditional on the judicial removal of the options. Our task under the Williams Act is not to speculate about what price the Marathon shareholders might have been offered if the natural market forces existed in this tender offer contest, but rather to enforce the mandate of section 14(e) against manipulation of the market. ***The purpose of the Williams Act, protection of the target shareholders, requires that Mobil and any other interested bidder be permitted an equal opportunity to compete in the marketplace and persuade the Marathon shareholders to sell their shares to them.*** 669 F.2d at 376. (Emphasis added.)

Thus, *Mobil* holds that it is manipulative for a target corporation to alter its structure in some fundamental way in order to rig the market and give one suitor an unequal edge over another.

It is clear that the Second Circuit's decision here is in direct conflict with *Mobil*.

The decision below rests, we submit, on a basic error of law: namely, that the Williams Act seeks to maintain the competitive balance in tender offers *only* through the means of full disclosure. This reading ignores the plain language of the statute—as a matter of common and legal usage, bid rigging is surely "manipulative."

Indeed, this Court has recognized that the Williams Act is not so limited. Just last term, in *Edgar* v. *Mite Corp.*, 457 U.S. 624 (1982), this Court held certain provisions of the Illinois Business Takeover Act, Ill. Rev. Stat., ch. 121-1/2, ¶ 137.51 *et seq.*, to be unconstitutional merely because they afforded incumbent management opportunities to delay—and thereby possibly defeat—an otherwise lawful tender offer. In his opinion, Justice White noted that the Williams Act was more than just a disclosure statute. He stated:

> [C]ongress sought to protect the investor not only by furnishing him with the necessary information but also *by withholding from management any undue advantage that could frustrate the exercise of an informed choice*. 457 U.S. at 634 (emphasis added).

In *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court held that Section 14(e) is concerned not just with disclosure but also with "conduct" seeking to "influence" the outcome of tender offers:

> *Besides requiring disclosure* and providing specific benefits for tendering shareholders, *the Williams Act also contains a broad antifraud prohibition* . . . This provision was expressly directed at the conduct of a broad range of persons, including those engaged in making or opposing tender offers or otherwise *seeking to influence*

> the decision of investors *or the outcome of the tender offer.* 430 U.S. at 24 (emphasis added).

This Court's decision in *Edgar* v. *Mite Corp., supra,* is a recognition of the realities of the marketplace, namely that disclosure, no matter how extensive, accomplishes little if the target's management can employ defensive tactics that deprive or otherwise materially impede the investor's freedom of choice. *See also Shores* v. *Sklar,* 647 F.2d 462, 464 (5th Cir. 1981) (the securities laws are intended to protect "the market's honest function"). Surely, the issuance of a large block of stock and stock options to a favored bidder in the hope that other bidders will drop out of the competition constitutes "conduct . . . seeking to influence . . . the outcome of the tender offer."

Indeed, in the House hearings on the Williams Act, Manuel F. Cohen, then Chairman of the Securities and Exchange Commission, anticipated that new devices to manipulate the market so as to defeat tender offers would be developed, and would have to be regulated:

> [T]here is involved a form of industrial warfare in which stakes are high, and two or more groups are attempting to manipulate the public security holders to their own advantage. . . As in most other areas entrusted to it, the Commission's responsibility should be limited to requiring appropriate disclosure, to guarding against deceptive and unfair devices designed to coerce or prevent action, and it should be provided with adequate tools to deal effectively with the various techniques that have been developed, and are continuing to be devised to seek or prevent takeover bids and other matters dealt with in the bill. Finally adequate authority must be accorded to deal with the violations of these precepts—all designed to give the investor the fairest possible opportunity to make his own investment decisions.

Full Disclosure of Corporate Equity, Hearings on H.R. 14475, S.510 Before the Committee on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 11 (1968).

The Court of Appeals below therefore clearly erred in holding that Section 14(e) is merely a disclosure statute.

II.

The Issues Raised by this Petition Are of Great Public Importance

The issues here presented are of overriding public importance and deserving of this Court's attention.

First, the conflict between the Second and Sixth Circuits threatens to create a situation in which investors in different parts of the country will not have equal protection under the securities laws. Thus, some shareholders will have no recourse against managements who employ lock-ups to defeat or deter tender offers, while others will be able to assert *Mobil*-type claims. Since the securities markets operate on a national scale, and tender offers are generally made nationwide, there is a particular need for the securities laws to be applied on a uniform basis.

Second, this is not a matter of merely academic or passing interest. Lock-ups are being employed with increasing frequency by companies who are resisting tender offers. *See, e.g.*, *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 99,451 (S.D.N.Y. 1983); *Marshall Field & Co.* v. *Icahn*, 537 F. Supp. 413 (S.D.N.Y. 1982). Indeed, some managements are using lock-ups as a means to insulate their companies from future tender offers.

The recent merger between Instrumentation Laboratory, Inc. ("IL") and Allied Corporation ("Allied") is an example of the latter. It shows what can happen—and will doubtless happen more frequently—unless the courts treat lock-ups as manipulative. In January, 1983, IL and Allied entered into a merger agreement to be preceeded by a cash tender offer for IL stock by Allied. As part of the merger agreement, the IL board granted Allied an option to purchase 3,000,000 authorized but unissued shares. If Allied exercised the option, it would hold *over 50%* of IL's outstanding stock. IL received nothing for

the option. "Allied Corp. Agrees to Buy Biomedical Firm," *Wall Street Journal*, January 31, 1983, p. 7.

This option could have had no purpose but to give Allied an unassailable lock on IL. The size of the option absolutely barred anyone else from making a competing bid because there was no way a competing bidder could defeat the merger agreement between IL and Allied, even if it acquired all of the outstanding stock. Yet the court below would term this lock-up not "manipulative."

Finally, the conflict between the Second and Sixth Circuits will encourage races to the courthouse and forum shopping in tender offer litigation as one side or the other seeks the most favorable venue vis-a-vis the legality of lock-ups.

CONCLUSION

For the foregoing reasons, we ask the Court to grant a writ of certiorari to review the decision below.

Dated: November 10, 1983

Respectfully submitted,

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APPENDICES

APPENDIX A

Listing Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

The following is a list of all parent companies, subsidiaries, except wholly owned subsidiaries (which includes subsidiaries with directors' qualifying shares), and affiliates of Ampco-Pittsburgh Corporation:

Name	*Place of Incorporation*
The Louis Berkman Company	Ohio
First Financial Group, Inc.	Pennsylvania
Vulcan, Inc.*	Pennsylvania

The following is a list of all parent companies, subsidiaries, except wholly owned subsidiaries (which includes subsidiaries with directors' qualifying shares), and affiliates of Buffalo Forge Company:

Name	*Place of Incorporation*
Ampco-Pittsburgh Corporation	Pennsylvania

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* Not an affiliate for purposes of the federal securities laws but listed because Ampco-Pittsburgh Corporation owns approximately 19% of its outstanding common stock.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. Nos. 1441, 1602—August Term, 1982

(Argued June 15, 1983 Decided September 22, 1983)

Docket Nos. 83-7199, 83-7211

BUFFALO FORGE COMPANY, AMPCO-PITTSBURGH CORPORATION, and AMPCO-PITTSBURGH SECURITIES II CORPORATION,

Plaintiffs-Appellants, Cross-Appellees,

—v.—

OGDEN CORPORATION,

Defendant-Appellee, Cross-Appellant,

—and—

DAVID R. NEWCOMB, RAYMOND J. POPP, THOMAS W. BURKE, EDWARD W. DUFFY, JOHN R. GREGORY, and FREDERICK S. PIERCE,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, PIERCE and WISDOM,*

Circuit Judges.

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* Senior Circuit Judge of the Fifth Circuit, sitting by designation.

Appeal from a judgment of the United States District Court for the Western District of New York (Curtin, C.J.) holding that the sale and option of treasury stock by a target corporation's management to one of the bidders in a takeover contest did not violate state fiduciary law or federal securities laws. Affirmed.

JAY TOPKIS, New York, N.Y. (Paul, Weiss, Rifkind, Wharton & Garrison, Jack Hassid, Colleen McMahon and Andrew J. Peck, New York, N.Y., of Counsel), *for Plaintiffs-Appellants, Cross-Appellees Buffalo Forge Company, et al.*.

JOHN L. WARDEN, New York, N.Y. (Sullivan & Cromwell, David B. Tulchin, William L. Farris and Lori F. Damrosch, New York, N.Y., of Counsel), *for Defendant-Appellee, Cross-Appellant Ogden Corporation*.

VAUGHN C. WILLIAMS, New York, N.Y. (Skadden, Arps, Slate, Meagher & Flom, Charles M. Yablon and Janet L. Goetz, New York, N.Y., of Counsel), *for Defendants-Appellees*.

VAN GRAAFEILAND, *Circuit Judge*:

This appeal presents us with questions concerning the legality of management's attempts to thwart a corporate takeover where the bidder has made a financially unsatisfactory tender offer. The facts are set forth in detail in the district court's opinion reported in 555 F. Supp. at 892 and require only brief summarization herein.

In response to a tender offer of $25 per share made on January 2, 1981 by plaintiff, Ampco-Pittsburgh Corporation, the individual defendants, the Board of Directors of Buffalo Forge Company, began a search for more favorable offers. After some negotiations, they approved a merger proposal from defendant, Ogden Corporation, calling for an even exchange of Ogden stock, then trading at $32.75, for shares of Buffalo Forge. As part of the "Agreement and Plan of Reorganization" between the parties, the directors agreed to sell Ogden 425,000 shares of Buffalo Forge treasury stock at $32.75 per share, to be paid for by a ten-year, nine percent note in the face amount of $13,918,750, and gave Ogden a one-year option to purchase an additional 143,400 treasury shares on similar terms. A bidding war between Ampco and Ogden ensued, which Ampco won with a bid of $37.50 per share.

After completing the takeover through its wholly-owned subsidiary, Ampco-Pittsburgh Securities II Corporation, Ampco refused to recognize the Ogden agreement, contending that it resulted from a breach of the directors' fiduciary duties and constituted a manipulative device in violation of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). Ampco refused the tender of Ogden's 425,000 shares, refused to pay dividends on the stock held by Ogden, and denied Ogden the right to exercise its option for the purchase of additional shares. Ampco sued for rescission of the transaction and sought damages from the individual defendants in the event rescission was denied.

After a bench trial in the United States District Court for the Western District of New York, Chief Judge Curtin dismissed Ampco's claims. He held that the Buffalo Forge directors did not violate their fiduciary obligations in selling the treasury stock to Ogden and that the sale was not a manipulative device prohibited by the Williams Act. He also held that Ampco did not have standing to rescind the sale under section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b), because neither it nor Buffalo Forge was an unwilling innocent party to the contract. He disposed of Ogden's counter-claim by holding that Ogden was entitled to $37.50 for each of the treasury

shares it owned or had attempted to buy on option and that it was entitled to the declared but unpaid dividend. He ordered pre-judgment interest at the statutory rate. N.Y. Civ. Prac. Law §§ 5001, 5004 (McKinney 1963 & Supp. 1982). Judgment was entered denying plaintiffs all relief and awarding Ogden judgment against plaintiffs in the amount of $24,598,272. We affirm.

In view of the district court's findings, all of which have substantial support in the evidence, appellants' contentions concerning alleged breaches of fiduciary duty by the defendant directors merit little more comment than is contained in the district court's opinion. The district court found:

> (1) None of the directors was "motivated to oppose Ampco's tender offer and accept Ogden's offer due to self-interest" and the directors "voted for the Ogden $32.75 offer because it was the best offer available," 555 F. Supp. at 904;
>
> (2) The directors were not guilty of fraud or bad faith, *id.* at 903-04;
>
> (3) There were no improprieties in the relationships between the directors and the company's financial and legal advisors or in the directors' reliance upon the counsel which the advisors gave, *id.*;
>
> (4) The negotiations with Ogden were at arm's length, and the price received for the treasury stock, based on discounted value of Ogden's note, exceeded the cost of the stock, its book value and its normal trading price, *id.* at 904-05.

Under the circumstances, it would have been a mistake for the district court to substitute its judgment for the business judgment of the directors, the exercise of which brought about an increase in Ampco's tender offer from $25 a share to $37.50 a share. *See Auerbach v. Bennett*, 47 N.Y.2d 619, 630-31 (1979); *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 382-83 (2d Cir. 1980); *Crouse-Hinds Co. v. Internorth, Inc.*, 634 F.2d 690,

701-04 (2d Cir. 1980); N.Y. Bus. Corp. Law §§ 504(e), 717 (McKinney 1963 and Supp. 1982).

It also would have been a mistake for the district court to adopt Ampco's argument that the sale of the treasury stock violated section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), which proscribes "fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer." In advancing this argument, Ampco relied on the Sixth Circuit case of *Mobil Corp. v. Marathon Oil Corp.*, 669 F.2d 366 (6th Cir. 1981). In that case, Marathon, in an attempt to avoid a takeover by Mobil, gave United States Steel Corporation, a competing bidder, an option to purchase a large number of Marathon's treasury shares and an option to purchase a valuable oil field. The court held that the options, individually and in combination, circumvented the natural forces of market demand and, therefore, were manipulative acts under the statute. *Id.* at 376-77. It concluded that Mobil was entitled to injunctive relief.

We believe that *Marathon* was an unwarranted extension of the Williams Act. "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). The Act "was designed solely to get needed information to the investor." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977). An essential ingredient of a section 14(e) cause of action, therefore, is misrepresentation, *i.e.*, the omission or misstatement of material facts. *Lewis v. McGraw*, 619 F.2d 192, 195 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 373 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); *Atchley v. Qonaar Corp.*, 704 F.2d 355, 359 (7th Cir. 1983); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

The *Marathon* court's concern that it would cost non-favored bidders, seeking 40,000,000 shares of Marathon stock,

"1.1 to 1.2 billion additional dollars to match the U.S.S. tender offer", 669 F.2d at 375, is not the sort of concern that motivated Congress in enacting the Williams Act. "[T]ender offerors were not the intended beneficiaries of the bill. . . ." *Piper v. Chris-Craft Indus., Inc., supra*,430 U.S. at 28. Congress felt that cash tender offers were similar to proxy contests and saw no reason why disclosure shuld not be required in the former as in the latter. H.R. Rep. No. 1711, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S. Code Cong. & Ad. News 2811, 2813. The Act, therefore, was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision." *Id.*

Although Congress intended that the Act should favor neither management nor takeover bidders and should give neither an undue advantage that would frustrate the exercise of an informed choice by investors, Congress's concern was more with the procedural provisions of the Act than with the substantive terms of takeover bids. For example, in pursuance of its policy of impartiality, Congress rejected all legislative proposals that might have caused excessive delays in the tender offer process, because it felt that excessive delays unduly favored incumbent management. *Edgar v. Mite Corp.*, 50 U.S.L.W. 4767, 4769-70 (June 23, 1982). Congress felt that it was for fully-informed investors to decide whether takeover offers were fair and equitable and that the investors should "be free to make their own decisions." *Id.* at 4771. Congress's ban on "manipulative acts and practices" was directed only at rigged transactions that might mislead investors in the making of these decisions. *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51, 56 (2d Cir. 1982), *quoting Sante Fe Indus., Inc. v. Green*, 430 U.S. 462, 476-77 (1977). There were no misleading, manipulative acts in the instant case. In short, we agree with the district court that Ampco's reliance on *Marathon* was misplaced and that the defendants herein did not violate section 14(e). *See* Note, *Developments in Corporate Takeover Techniques: Creeping Tender Offers, Lockup Arrangements, and Standstill Agreements*, 39 Wash. & Lee L. Rev. 1095 (1982).

The district court did not err in awarding pre-judgment interest at the statutory rate. *See United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976). Our disposition on the merits makes it unnecessary to discuss the parties' contentions concerning lack of standing and availability of remedies. The judgment of the district court is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
W.D. NEW YORK

No. CIV-81-29C

Jan. 27, 1983

BUFFALO FORGE COMPANY, Ampco-Pittsburgh Corporation, and Ampco-Pittsburgh Securities II Corporation,

Plaintiffs,

—v.—

OGDEN CORPORATION, David R. Newcomb, Raymond J. Popp, Thomas W. Burke, Edward W. Duffy, John H. Gregory, and Frederick S. Pierce,

Defendants.

Successful tender offeror brought suit seeking rescission of treasury stock sale and purchase option made to a competing tender offeror by target company's former directors, and also charging said directors with breach of fiduciary duties and waste of corporate assets. The District Court, Curtin, Chief Judge, held that: (1) successful tender offeror failed to meet its burden of showing that a majority of target company's former directors acted in bad faith or from self-interest in approving earlier merger agreement with unsuccessful tender offeror; (2) even if plaintiffs succeeded in rebutting the presumption of good faith which attached to the actions of the former corporate directors, there was nothing to indicate that the sale of target company's treasury stock to the unsuccessful tender offeror should be rescinded because it was not "fair" to the

company; and (3) rescission of the treasury stock sale and option to acquire additional treasury shares would not be a proper remedy in any event, since there was nothing to indicate that the other party to the contract, the unsuccessful tender offeror, was guilty of wrongdoing.

Judgment in accordance with opinion.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York City (Jay Topkis, New York City, of counsel), and Moot & Sprague, Buffalo, N.Y., *for plaintiffs*.

SULLIVAN & CROMWELL, New York City (David Tulchin, and John Warden, New York City, of counsel), and Offerman, Fallon, Mahoney & Cassano, Buffalo, N.Y., *for defendant Ogden Corp.*

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, New York City (Vaughn C. Williams, New York City, of counsel), *for individual defendants.*

CURTIN, *Chief Judge*.

I. Introduction

This action was commenced in January 1981 with a request for injunctive relief by the Buffalo Forge Company [Buffalo Forge]. Plaintiff charged the Ampco-Pittsburgh Corporation [Ampco] with violations of various federal securities, antitrust, and banking laws. The charges arose within the context of an attempt by Ampco to purchase all Buffalo Forge stock at a price of $25 per share.

The request for an injunction was denied on January 26, 1981, on the ground that Buffalo Forge did not demonstrate sufficient preliminary proof to warrant the issuance of an injunction. This decision was affirmed by the United States Court of Appeals for the Second Circuit. *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568 (2d Cir. 1981).

Throughout these proceedings, Buffalo Forge resisted Ampco's proposed acquisition and rejected the stated price per share. Buffalo Forge searched for an alternate buyer for its stock. On February 9, 1981, Buffalo Forge entered into a merger agreement with a "white knight," Ogden Corporation [Ogden].

As part of this agreement Ogden purchased 425,000 of Buffalo Forge treasury shares at $32.75 per share. Ogden paid [*sic*] these shares with a promissory note, payable over 10 years with an annual interest rate of 9 percent. The agreement also granted Ogden a one-year option to acquire an additional 143,400 treasury shares, again for the price of $32.75 per share.

The merger agreement was announced to the public the same day. A flurry of bidding activity followed the announcement. On February 10, Ampco increased its offer from $25 to $34 per share. Ogden then moved by making a cash tender offer of $37 per share for 850,000 shares, to be followed by a tax-free share-for-share merger with Buffalo Forge. Ampco responded by increasing its offer to $37.50 per share, whereupon Ogden withdrew from the bidding war.

Ampco thus acquired control over Buffalo Forge. On March 9, Ogden tendered its 425,000 shares of Buffalo Forge stock. Ampco refused to pay for the shares. The Buffalo Forge Board of Directors had declared a 27½ cent dividend per share on March 5. The dividend was not paid to Ogden. In January 1982, Ampco had refused to let Ogden exercise its option to purchase the additional shares of stock. Ampco stated that it would not pay for any stock, nor would it pay the dividend until after a judicial determination regarding the validity of the purchase of the shares. These are the actions underlying this dispute.

In June 1981, after it acquired control over Buffalo Forge, Ampco moved to amend its complaint to delete certain of the claims, primarily those asserted under the federal securities laws, and to realign the parties. The motion was granted, and Ampco was given leave to prosecute the claims against the former directors in the name of Buffalo Forge and the Ampco-Pittsburgh Securities II Corporation (the entity organized by Ampco for the purpose of facilitating the takeover). For purposes of simplification, the plaintiffs shall be referred to as "Ampco."

Basically, Ampco seeks rescission of the sale of the treasury stock and the option to purchase made to Ogden by the former members of the Buffalo Forge Board of Directors. Plaintiffs charge the former members, David R. Newcomb, Raymond J. Popp, Thomas W. Burke, Edward W. Duffy, John A. Gregory, and Frederick S. Pierce (collectively referred to as the individual defendants) with breach of their fiduciary duties to the corporation and with waste of the business assets of Buffalo Forge. Ampco has set forth a number of grounds upon which its claims are based. Ampco alleges that the individual defendants were primarily motivated by their own interest in avoiding a taxable sale of their stock because some of the directors held sizeable quantities of stock at low tax bases. This caused the directors, according to the plaintiffs, to seek out a tax-free, share-for-share exchange, like that offered by Ogden, and reject other tender offers.

In addition, Ampco claims that the failure of the individual defendants and Newcomb, in particular, to negotiate directly with Ampco to obtain a better offer was a breach of their fiduciary duty. Also, that the sale of the 425,000 treasury shares and the purchase option given in exchange for a ten-year, 9 percent promissory note was a "tip" to Ogden, and the contract was entered into in an attempt to stifle bidding competition.

Claiming that Ogden conspired with the individual defendants, with Newcomb, in particular, and their agents, Ampco seeks rescission of the sale of the stock. In the alternative, Ampco seeks damages from the individual defendants.

The defendants have denied any impropriety in the negotiations or in the contract for the sale of the stock. The individual defendants claim that they were acting as reasonable directors at all times and exercised their best business judgment. They contend that their actions were undertaken, in part, upon the professional advice of investment bankers and lawyers and are protected by operation of the provisions of the New York Business Corporation Law §§ 504, 717.

Ogden has filed several counterclaims seeking payment for the 425,000 shares of stock, plus the 143,400 shares available to Ogden under the purchase-option clause of the merger agreement. In its capacity as a shareholder, Ogden demands payment of the dividend of 27½ cents per share, declared by the Board of Directors on March 5, 1981, and payable on March 31, 1981.

In addition, Ogden claims that Ampco's refusal to pay for the 425,000 shares on the same basis as was afforded other tendering shareholders constitutes a manipulative practice in violation of the New York Security Takeover Disclosure Act, New York Business Corporation Law §§ 1600 *et seq.* and its accompanying regulations. Ogden charges Ampco with violations of the provisions of Article 8 of the New York Uniform Commercial Code and various provisions of the Business Corporation Law. Ogden seeks payment with interest at the prime rate.

The case was set for trial after the amended pleadings were filed. In a supplemental memorandum of law submitted in December 1981 and a pretrial conference held on January 6, 1982, the plaintiffs moved again to amend their complaint to state a claim of violation of the federal securities laws. Ampco set forth its argument that the sale of the stock, plus an option to purchase given to one of two competing tender offerors, constituted a "manipulative device" within the meaning of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), and that the plaintiffs are entitled to rescission of the contract pursuant to 15 U.S.C. § 78cc(b).

Trial on all of these issues was held on January 26, 27, and 28, 1982. Prior to trial, the parties filed a joint stipulation of

facts. These stipulations are accepted and made a part of the court's decision. After review of the trial transcripts and memoranda of law, and after examination of the exhibits produced at trial, the court makes the following findings of fact and conclusions of law.

II. Parties

Buffalo Forge Company is a New York corporation, with its principal place of business at 490 Broadway Street, Buffalo, New York. Since July 14, 1981, Buffalo Forge has been an indirect, wholly owned subsidiary of Ampco-Pittsburgh Corporation, which is a Pennsylvania corporation, with its principal place of business at 700 Porter Building, Pittsburgh, Pennsylvania. Also involved is Ampco-Pittsburgh Securities II Corporation [A-P II], a wholly owned subsidiary of Ampco, a Delaware corporation, with its principal place of business at 2625 Concord Pike, Wilmington, Delaware. The remaining corporate party is the Ogden Corporation, a Delaware corporation, with its principal place of business at 277 Park Avenue, New York, New York.

Chief amongst the individual litigants is David R. Newcomb who was, until March 30, 1981, President, Chief Executive Officer, and a director of Buffalo Forge. He is currently President of Buffalo Forge and a director of Ampco. Raymond J. Popp, Thomas W. Burke, Edward W. Duffy, John A. Gregory, and Frederick S. Pierce were directors of Buffalo Forge at all times from January 2, 1981, to March 30, 1981. During the time period under question, it is undisputed that the directors held the following shares of Buffalo Forge stock:

Newcomb	24,054
Popp	8,974
Burke	1,000
Duffy	200
Gregory	22,700
Pierce	72,745

All of the directors' stock was held at tax bases below $25 per share.

III. Findings of Fact

On Friday, January 2, 1981, Marshall Berkman, [Berkman], Chairman of Ampco, telephoned Newcomb to inform him that Ampco was about to announce its intention to make a $25 per share tender offer for Buffalo Forge shares. There had been no prior contact between Ampco and Buffalo Forge. That same day, Ampco issued a press release to announce its proposed $25 offer.

The proposed acquisition was communicated by Newcomb to the remaining members of the Buffalo Forge Board of Directors. Newcomb also contacted Buffalo Forge's financial advisor, Kidder, Peabody & Co. [Kidder], its lawyers, Skadden, Arps, Slate, Meagher & Flom [Skadden Arps], and Lord, Day & Lord [Lord Day] to inform them of Ampco's offer. The Board decided to take no action until Ampco's offer was formally commenced.

On January 7, 1981, Ampco formally commenced its tender offer for any and all shares of Buffalo Forge at a price of $25 per share. The expiration date of the offer was February 3, 1981. Acceptance of the offer by any shareholder would have resulted in the recognition of gain for tax purposes to the extent that $25 exceeded such shareholder's tax basis for such shares.

On that same day, January 7, 1981, Kidder submitted a new agreement to Newcomb, which he signed on January 8 after consulting with legal counsel. The agreement provided that Kidder was specifically retained to advise Buffalo Forge with respect to Ampco's offer and any other proposals, offers, or indications of interest concerning the sale or acquisition of Buffalo Forge's stock or assets over the next 18 months. The agreement contained standard provisions and called for Buffalo Forge to pay Kidder a fee of $150,000.00, plus an additional fee of 6 percent of the amount by which the aggregate value of any acquisition of Buffalo Forge exceeded $25 per share acquired. If at least 80 percent of Buffalo Forge's stock was tendered in such a transaction, the additional fee was payable on 100 percent of the shares.

Before signing the retainer agreement, Newcomb consulted with counsel for Buffalo Forge and was advised that the terms of the retainer agreement were ordinary and fair.

The Buffalo Forge Board met to consider Ampco's offer on January 8, 1981. At that meeting, Kidder rendered its written opinion that Ampco's offer of $25 cash per share of Buffalo Forge was "inadequate." Kidder also advised the Board that it should be possible to obtain a significantly higher offer than $25 per share. Also at the January 8 Board meeting, representatives of Skadden Arps and Lord Day reviewed the legal implications of Ampco's offer, including the directors' fiduciary responsibilities. The directors of Buffalo Forge determined unanimously that Ampco's offer was "inadequate and not in the best interests" of Buffalo Forge and its shareholders and unanimously resolved to recommend to the shareholders that they reject the offer.

The Board passed a resolution authorizing the appropriate officers and the investment bankers and legal counsel of the company

> to explore and investigate certain types of possible transactions including, without limitation the acquisition by the Company of all or part of the business of another company, the issuance or sale publicly or privately of equity or other securities of the Company, through acquisition of shares, the acquisition of the Company (or one or more of its businesses) by another Company, and joint ventures between the Company and other companies . . . ."

The Board also authorized the commencement of litigation against Ampco.

On January 9, 1981, the Buffalo Forge Board issued a press release and sent a letter to Buffalo Forge shareholders urging them to reject Ampco's offer.

Newcomb was authorized by the Board to seek out alternatives to Ampco's $25-per-share offer. As stated above, Buffalo Forge commenced this lawsuit against Ampco on January 9, 1981. On January 12, 1981, Buffalo Forge filed a request for a

public hearing with the New York State Attorney General pursuant to the New York Security Takeover Disclosure Act.

Ampco's offer was originally scheduled to expire on February 3, 1981. On January 27, 1981, the New York State Attorney General issued an order staying Ampco's purchase of shares to maintain the status quo pending the completion of his investigation. On February 2, 1981, the Attorney General issued a further order requiring certain disclosures and continuing the stay pending compliance with the disclosure order. On February 3, 1981, Ampco made the required disclosures by amendment of the registration statement previously filed with the Attorney General. On February 5, 1981, the Attorney General lifted the prohibition on Ampco's purchase of shares, effective at midnight on the fourth day after the mailing of the disclosures to Buffalo Forge's shareholders.

On January 23, 1981, the Buffalo Forge Board, on the recommendation of Newcomb, approved a proposal for the corporation to enter into employment agreements with key employees on terms to be negotiated by Newcomb. Such contracts with seven vice presidents were signed on February 20, 1981, effective as of January 31, 1981. Furthermore, on January 23, 1981, the Buffalo Forge Board unanimously approved the signing of a retainer agreement with the law firm of McGrath, Meyer, Lieberman & Lipp.

After the January 8 meeting of the Board, Newcomb undertook a search for alternative tender offers. After consulting with the investment bankers, Newcomb decided not to negotiate directly with Ampco to attempt to obtain an increase in Ampco's stated offer. This advice was based on Kidder's experience in unsolicited tender offer situations, which had shown that the offeror is unlikely to increase its bid substantially in the absence of a competing bid. Kidder also expressed its belief that, in light of its prior dealings with the Berkman family (which controlled Ampco), Ampco was not likely to raise its offering price. Kidder prepared a report about Buffalo Forge for distribution to interested companies.

As noted above, Ampco was free to purchase shares as of February 5, 1981, pursuant to the order of the Attorney

General. With this deadline in mind, Newcomb and Kidder contacted numerous companies to determine whether they were interested in making a tender offer. The members of the Board of Directors were aware of these negotiations.

Among the companies contacted by Newcomb and Kidder were: Central New Jersey Industries; Interpace Corporation; I.C. Industries; Thomas Tilling; Kuhnle, Kopp & Kausch of West Germany [KKK]; and Bass Brothers of Houston. These were the companies which, in addition to Ogden, expressed the strongest interest in acquiring Buffalo Forge. Newcomb and Kidder discussed the possibility of acquisition with numerous other companies as well. After initial discussions, Central New Jersey Industries concluded that it was without adequate financial resources to make an acceptable offer and withdrew from the arena of potential bidders.

Newcomb traveled to West Germany to meet with KKK. He discussed with KKK the possibility of the purchase of all of the Buffalo Forge treasury stock for a price of at least $25 per share in cash. The talks did not result in a tender offer. At about the same time, Kidder discussed the possibility of the sale of Buffalo Forge treasury stock to Bass Brothers of Houston, also without success.

Two companies, in addition to Ogden and Ampco, made offers to Buffalo Forge. These offers came after negotiations with Ogden had begun.

One of the companies that made an offer to Buffalo Forge was Thomas Tilling, Inc. [Tilling], a British company. Representatives of Tilling visited Buffalo Forge during the week of January 26. On February 5 and 6, Tilling told Douglas Brown of Kidder that, subject to its Board's approval, Tilling was prepared to make a cash tender offer at $30 per share, not conditioned on the sale of any treasury stock.

Tilling was not able to make a firm offer to Buffalo Forge at that time, however, because its Board would not meet in the United Kingdom until February 9 or 10. Those dates would have been subsequent to Ampco's completed tender offer. Mr. Collin Draper, Chief Executive Officer of Tilling's United States operations, assured Mr. Brown that he would recom-

mend the acquisition to the Board and that he was confident that the Board would accept his recommendation. Tilling was not in a position to make a tax-free offer, because it was not a United States company. Mr. Brown told Tilling's representatives that a $30 bid would probably not be successful in any event. Tilling never made any firm offer.

The only other offer was made by I.C. Industries [ICI]. On February 4, 1981, after meetings that had begun during the week of January 19, 1981, ICI made a written offer to make a $30-per-share cash tender offer for Buffalo Forge.

This ICI proposal had three conditions. First, ICI required that Buffalo Forge give ICI an option to purchase Buffalo Forge's treasury stock. Second, ICI required that Buffalo Forge obtain agreements from Buffalo Forge's largest shareholders that they would tender their shares to ICI. ICI's offer also would have been a taxable transaction to Buffalo Forge shareholders. Finally, ICI's proposal was conditioned upon a response by Buffalo Forge by 10 a.m. on February 5.

After receipt of the ICI offer, Buffalo Forge's lawyers met with ICI's lawyers on February 4 and 5 to attempt to negotiate a better offer. Buffalo Forge received ICI's offer and Ogden's offer on the same day. Newcomb did not call a Board meeting to consider ICI's proposal before it had expired, although he was authorized to call a telephone conference call meeting.

ICI's offer expired by its terms on February 5, 1981. Thereafter, ICI's Chairman sent a telegram to ICI's Board members, stating:

> Ogden Corporation and Buffalo Forge have signed a merger agreement for a tax free exchange said to be worth $32.75 per Buffalo Forge share. There are no regrets here. We feel our price was about right and are pleased not to have stretched to the point where our shareholder earnings would have been substantially diluted for this particular objective.

Buffalo Forge was then left with Ogden's offer, and this court must now address the controversy centered on the valid-

ity and propriety of the merger agreement between Ogden and Buffalo Forge.

Ogden's interest in Buffalo Forge was not the result of Kidder's effort. Ogden's Chairman, Ralph Ablon, read about Ampco's tender offer and, on January 21, called Newcomb to say that Ogden might have an interest in Buffalo Forge. This led to preliminary meetings in New York City on January 30 and in Buffalo on February 2 attended by Newcomb, Brown of Kidder, Ablon, Donald Krenz (Ogden's Vice President and chief counsel), and other Buffalo Forge and Ogden executives.

Kidder, and lawyers from Skadden Arps and Lord Day conducted the negotiations on behalf of Buffalo Forge. Newcomb did not participate directly in the negotiations. He remained in Buffalo, where he was in frequent telephone contact with the participants in the meetings.

Krenz had primary responsibility for the negotiations on behalf of Ogden. Krenz's first proposals involved a 6:7 exchange (6 shares of Ogden stock for 7 shares of Buffalo Forge stock) for either Ogden convertible preferred or common stock.

This new issue of convertible preferred stock was to be priced by Ogden in the $28 to $29 range. The new issue of Ogden common stock had a value to Buffalo Forge shareholders of approximately $28.07 per share. Brown told Krenz that the 6:7 exchange ratio was too low and suggested a share-for-share exchange.

On February 4, 1981, Ogden proposed a merger agreement which consisted of the following elements:

> (1) an exchange of Ogden common stock for Buffalo Forge common stock at a ratio of one-for-one, in the context of a tax-free merger between the two companies;
>
> (2) an option for Ogden to purchase 395,000 treasury shares of Buffalo Forge at $32.75 (the then-current price of Ogden's shares) per share, either in cash or with a promissory note maturing in nine months and bearing interest at the prime rate;

(3) the possibility for Buffalo Forge to purchase up to 500,000 shares of its own stock from its shareholders at a price not to exceed $32.75 per share;

(4) delivery by Buffalo Forge to Ogden of an option from holders of 25 percent of Buffalo Forge's common stock, agreeing to sell to Ogden at the merger price;

(5) $1 million liquidated damages if the deal were not consummated.

In raising the proposed exchange ratio from 6:7 to 1:1, Ogden increased the consideration each shareholder of Buffalo Forge would receive—and the total cost to Ogden—by 16 percent. Since Ogden's stock was then trading at $32.75 per share, the proposal represented a face value increase of 31 percent over Ampco's $25 offering price, and it was almost 10 percent higher than the offer made by ICI.

Ogden's Chairman, Ablon, called Newcomb on February 4 to inform him of Ogden's proposal. On the morning of February 5, Krenz and Ablon separately called Newcomb to describe Ogden's proposal in more detail. They both emphasized that an option on Buffalo Forge's treasury shares was an essential feature of that proposal. Ablon assured Newcomb that if Ogden acquired the treasury shares and an Ogden-Buffalo Forge merger were not consummated, Ogden would not dispose of the treasury shares without Buffalo Forge's approval.

In the negotiations between Ogden and Buffalo Forge, which took place on August 4, 5, and 6, and concluded in the Agreement and Plan of Reorganization (the "Merger Agreement"), Ogden was forced by Buffalo Forge to make concessions on many of the original elements of the proposed agreement.

Specifically, the Buffalo Forge negotiators told Ogden that the demand for $1 million in liquidated damages was unacceptable, and Ogden dropped this demand.

Ogden withdrew its request for shareholder commitment from the shareholders of 25 percent of the Buffalo Forge stock

upon being informed that Buffalo Forge would not be able to obtain such a commitment. Ogden settled, instead, for a statement by the directors (who collectively held about 6 percent of the stock) that they would vote their shares in favor of the Ogden proposal.

Another significant concession made by Ogden during the negotiations concerned the Buffalo Forge self-tender. Ogden's proposals were made in the form of stock exchange transactions, because Ogden wished to use its stock and not to make any cash contribution to any merger. Kidder, on the other hand, pressed to have Ogden provide some cash alternative for Buffalo Forge shareholders who might prefer to receive cash. Ogden was ultimately persuaded by Kidder to make a cash tender offer for up to 500,000 Buffalo Forge shares, at a price up to $32.75 per share, if any other party made a cash tender offer for Buffalo Forge shares at a price of $29 or more.

Because Buffalo Forge's lawyers were concerned that such a contingent tender offer might violate certain technical requirements of an applicable Securities and Exchange Commission rule, it was ultimately agreed that this contingent tender offer would instead be made by Buffalo Forge (to whom the Securities and Exchange Commission rule did not apply) and that Buffalo Forge would have the right to resell or "put" those shares to Ogden at the cash price paid by Buffalo Forge, plus the amount of any carrying costs incurred by Buffalo Forge. By this agreement, Ogden added a cash contribution of up to $16,375,000.00 to its proposal.

At the outset of negotiations, Ogden sought to negotiate only an agreement in principle and then to obtain the Board's approval and execute a merger agreement at some time after the expected termination of Ampco's $25 offer. Kidder, on the other hand, considered it important to have a firm merger agreement before it could recommend that Buffalo Forge accept the Ogden offer. Ultimately, Ogden agreed to have an immediate Board meeting and to enter into a formal merger agreement prior to the expected termination of Ampco's $25 tender offer.

From the beginning of negotiations, Ogden had also demanded, as a condition to making any offer, that it be granted an option to purchase Buffalo Forge's 568,400 shares of treasury stock. When Ogden first contemplated an offer for Buffalo Forge, Ogden considered purchasing the Buffalo Forge treasury stock for either cash or a short-term promissory note bearing interest at the prime rate. However, this specific proposal was never communicated to Buffalo Forge. After making what it considered to be significant concessions with regard to the terms of its proposed merger agreement, Ogden was not willing to pay cash for the treasury shares. Ogden instead insisted upon, and made the deal conditional upon, a sale of 425,000 treasury shares for a 10-year, 9 percent note of $32.75 face value, and a one-year option to purchase the remaining 143,400 treasury shares on similar terms.

Kidder attempted to negotiate more attractive terms for the promissory note, asking for cash and a higher interest rate with a shorter term. Ogden rejected these suggestions. Kidder also asked for amortization on the note, which was rejected, and for a cross-default provision, which Krenz agreed to include, with a limitation on its applicability to a default in $60 million of funded debt.

The sale of the treasury shares and the grant of the option for the additional 143,400 treasury shares on the negotiated terms were a precondition to Ogden's agreement to enter into the merger agreement, with Buffalo Forge as an integral part of the merger package.

Newcomb and Kidder concluded that the total $32.75 Ogden merger proposal was the best offer available to Buffalo Forge within the time period dictated by Ampco's pending $25 offer. Newcomb decided to recommend the offer to the Buffalo Forge Board.

On February 7, 1981, a special Buffalo Forge Board meeting was held to consider the Ogden offer. Prior to this meeting, the Individual Defendants had received and reviewed materials about Ogden. All except Edward Duffy attended. Mr. Duffy communicated by conference call. Representatives from Kidder, Skadden Arps, and Lord Day also attended. They re-

viewed the activities that Newcomb and Kidder had undertaken to explore alternative transactions to the Ampco tender offer. They specifically weighed ICI's $30 tender offer proposal.

Both Ogden and the Buffalo Forge directors were advised by legal counsel experienced in takeover matters that the transaction, including the sale of the treasury shares and grant of the option for the promissory note, was legal, valid, and proper. The Buffalo Forge directors were advised by their lawyers that acceptance of the Ogden proposal would be consistent with their fiduciary responsibilities to the Buffalo Forge shareholders. Representatives from Kidder advised the Board that the Ogden transaction, including the sale of the treasury shares, was "fair and adequate." Kidder also advised the Board that Ogden's was the best proposal available to the company at that time.

The Individual Defendants discussed various aspects of the Ogden offer. Pierce inquired about the strength of Ogden's management. Burke commented favorably on Ogden's marine operations, with which he was familiar. Duffy inquired about the present value of the promissory note Buffalo Forge would receive from Ogden in partial consideration for the treasury stock. Kidder responded that the note had a present value of approximately $25-$26 per share of Buffalo Forge stock. (Kidder had previously calculated the note's present value during the negotiations with Ogden.) Kidder's $26 valuation was an amount in excess of the book value of Buffalo Forge's common stock (which was $20.05) and in excess of the normal trading price of Buffalo Forge stock. As Duffy later calculated, this value was also in excess of Buffalo Forge's average cost of $13.20 for purchasing the treasury stock.

Each director understood that Ogden intended to put its own designees on the Buffalo Forge Board upon consummation of the merger. Following their discussion, the Individual Defendants unanimously approved the merger agreement "as in the best interests of the Company and its shareholders." They also approved the sale and option of treasury shares, resolving:

> that in the judgment of the Board of Directors of the Company the consideration to be received from Ogden

for the 425,000 shares of the Company's treasury stock and for the additional 143,400 shares of the Company's treasury stock subject to the Option is fair, adequate and sufficient consideration for the sale and purchase of such stock and the sale of such stock and grant of the Option is necessary and desirable in order to obtain for the Company and its shareholders the benefits of the merger contemplated by the Agreement and Plan of Reorganization.

On February 8, the Ogden Board of Directors approved the merger agreement. The merger agreement was executed on February 9; Ogden purchased the 425,000 treasury shares also on February 9. The transaction was announced publicly the same day.

On February 10, 1981, Ampco announced that it would raise its bid to $34 cash per share of Buffalo Forge stock. On February 11, Ampco formally revised its bid to incorporate the increase, and it simultaneously declared that it would refuse to pay for any shares tendered by Ogden until the validity of the sale of Buffalo Forge treasury stock to Ogden had been judicially determined.

Also on February 11, 1981, Ampco commenced litigation against both Buffalo Forge and Ogden in the United States District Court for the Southern District of New York on causes of action alleged to arise under sections 14(d) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d) and 78n(e), and the rules and regulations promulgated thereunder by the Securities and Exchange Commission. Ampco sought injunctive relief against the Ogden offer and the Ogden-Buffalo Forge merger. The gist of the complaint was that Buffalo Forge had failed to make certain disclosures required by the securities laws and had attempted to inflate the market price of its stock.

On February 11, 1981, Ampco commenced litigation in Supreme Court, New York County, against Buffalo Forge and its directors, claiming that the directors had breached their fiduciary duty by the sale of the treasury shares. Ampco sought

rescission of the sale. Both this action and the action described in the preceding paragraph were transferred by consent of all parties to this court to be deemed counterclaims in this action.

As a result of discussions between Buffalo Forge and Ogden, Ogden revised its offer in light of Ampco's higher bid. Ogden agreed to make a cash tender offer for 850,000 Buffalo Forge shares at $37 cash, after which the proposed share-for-share merger would be submitted to the remaining Buffalo Forge shareholders.

Buffalo Forge and Ogden announced the amendment of the merger agreement on February 20, and Ogden commenced its tender offer on February 25. On February 28, Ampco raised its offer again to $37.50 for any and all shares. As noted above, Ampco also announced that it would refuse to pay for any shares tendered by Ogden until a judicial determination of the validity of the stock transfer had been made.

Following Ampco's announcement of its $37.50 offer, Kidder and Newcomb sought to determine whether any higher offer might be made by Ogden or any third party. They determined that none was available, and on March 5, 1981, the Individual Defendants unanimously recommended that Buffalo Forge shareholders tender their shares to Ampco at the $37.50 price. On that same day, this court denied Ampco's and Buffalo Forge's requests for preliminary injunctive relief. Thereafter, on March 9, 1981, Ogden withdrew its pending tender offer, and certain obligatons under the merger agreement were terminated by mutual consent. As a result, Ampco discontinued its federal securities law claims as moot and pursued its rescission claim against Ogden and the directors, solely under the state law theory that the directors had breached their fiduciary duties.

On March 5, 1981, the Buffalo Forge Board declared a dividend of 27½ cents per share, payable March 31, 1981, to holders of record of Buffalo Forge common stock as of March 17, 1981. Ogden was a holder of record of 425,000 shares on that date.

Ampco's Chairman, Marshall Berkman, caused Buffalo Forge not to pay Ogden the dividend declared on March 5,

1981. All other shareholders of record as of March 17, 1981, received such dividend. Ampco sought and obtained the resignation of all of Buffalo Forge's directors, but for Newcomb, who was given a place on Ampco's Board. On July 14, Ampco caused one of its wholly owned subsidiaries (Ampco-Pittsburgh Securities VI Corporation) to be merged into Buffalo Forge.

On January 5, 1982, Ogden notified Buffalo Forge that it was exercising its option to purchase 143,400 treasury shares, enclosed a 9-year, 9 percent note, and sought $37.50 cash per share. By letter dated January 8, 1982, Buffalo Forge refused to pay for the option shares, pending judicial resolution of the validity of the treasury share sale and option.

IV. Conclusions of Law

As the United States Court of Appeals for the Second Circuit has held, the "business judgment rule" is applicable to actions undertaken within the context of bidding wars and other contests for control of a corporation. *See Treadway Co. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980); *Crouse-Hinds Co. v. Inter North, Inc.*, 634 F.2d 690 (2d Cir. 1980); *Auerbach v. Bennett,* 47 N.Y.2d 619, 419 N.Y.S.2d 920, 393 N.E.2d 994 (1979).

> The business judgment doctrine:
> bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.

Auerbach v. Bennett, supra at 629, 419 N.Y.S.2d 920, 393 N.E.2d 994. Absent proof of self-interest or bad faith on the part of the directors, therefore, the court may not second-guess the decisions of the directors.

The record shows that Ampco has failed to rebut the presumption that the actions of the directors were undertaken in good faith.

The record does not show that Newcomb or any of the directors were motivated to oppose Ampco's tender offer and accept Ogden's offer due to self-interest. Each director unequivocally denied that his personal tax considerations influenced his decision. Moreover, at least three of the six directors of Buffalo Forge could not have possibly been so motivated. Edward Duffy, the Chief Executive Officer of Marine Midland Bank, and Thomas Burke, the Chief Executive Officer of American Steamship Company, each held but a nominal number of shares, and under Canadian law, it was to the advantage of John Gregory, a Canadian citizen, to accept a cash offer rather than an exchange of stock. Finally, the Board as a whole cannot be charged with having acted from self-interest where less than a majority are found to have done so. *See Treadway, supra,* 638 F.2d at 383.

The record shows that the Individual Defendants voted for the Ogden $32.75 offer because it was the best offer available—even without respect to its tax-free feature. The tax-free feature of Ogden's offer was an additional benefit available to all Buffalo Forge shareholders. Buffalo Forge shareholders surveyed in December 1980 reported an average tax base for their stock of "more than $10.00." This evidence supports the reasonableness of the Individual Defendants' view that many Buffalo Forge shareholders had a low enough tax base to benefit from a tax-free transaction.

The directors did not violate their fiduciary duties during the negotiating process. Ampco's contention that the retainer agreement between Buffalo Forge and Kidder created a "conflict of interest" on Kidder's part is without support in the record. The agreement was signed only after Newcomb received the assurance of legal counsel that such a retainer agreement was proper. Pursuant to New York Business Corporation Law § 717, Newcomb was entitled to rely upon the representations of counsel.

Moreover, the retainer agreement could not influence Kidder to try to prevent a takeover by Ampco. Under the agreement,

Kidder's contingent fee would be increased as a result of any successful bid at a price higher than $25 per share.

Similarly, Ampco may not object to the decision to have Buffalo Forge's agents do much of the actual negotiation (subject always to Newcomb's control and the Board's approval). The directors considered Kidder and the attorneys from Skadden Arps, in particular, to be better equipped for such negotiations. The attorneys and Kidder were experienced in merger and acquisition transactions and could lend a professional expertise to the negotiations that the Individual Defendants, acting alone, could not. It was certainly a reasonable business practice to authorize Kidder and the attorneys to negotiate in those circumstances. And, again, pursuant to Business Corporation Law § 717, the directors were entitled to rely upon these agents. Reliance upon the attorney's advice, even when unsound, is not a breach of fiduciary duty. *Tannenbaum v. Zeller,* 399 F.Supp. 945, 955 (S.D.N.Y.1975), *aff'd in part and rev'd on other grounds,* 552 F.2d 402 (2d Cir.1977), *cert. denied,* 434 U.S. 934, 98 S.Ct. 421, 54 L.Ed.2d 293 (1977).

At no point during these negotiations did Ogden become aware of any facts that led or should have led it to believe that the Buffalo Forge negotiators or directors were acting out of self-interest or in breach of their duty to obtain the best possible offer for Buffalo Forge shareholders. Instead, the Buffalo Forge negotiators drove a hard bargain in arm's length negotiations and demanded and received significant concessions on many points.

The sale of the treasury stock was valid and proper. It was negotiated as part of the total Ogden merger proposal and in exchange for receipt of the $32.75 merger proposal.

The terms of the promissory note given for the treasury shares were negotiated at arm's length between Ogden and Buffalo Forge. The record shows that the Individual Defendants were advised by Kidder that the promissory note had a present value of approximate $26 per share of treasury stock and that the Individual Defendants reasonably relied on that valuation. They sold the treasury stock at a price that exceeded

the book value of the shares, the normal trading price of the shares, and the cost to Buffalo Forge of the shares.

At trial, two witnesses valued the Ogden promissory note at amounts less than the $26 Kidder valuation (Ampco's expert—$9,136,300.00, or $21.50 per share, and the Individual Defendants' expert—$24.46 per share). Ampco's trial expert conceded that such valuations are not an exact science and that he would not criticize other reasonable but higher valuations.

Both of these valuations support the conclusion that the Individual Defendants acted reasonably in relying on the Kidder valuation of the Ogden promissory note. They also reflect that the Individual Defendants acted reasonably in accepting the promissory note as part of the consideration contained in the Ogden merger proposal. All of the above valuations show that the note had a value that exceeded the book value of the shares, their cost to Buffalo Forge, and their normal trading price prior to Ampco's announcement of its tender offer for Buffalo Forge.

Moreover, despite the plaintiffs' contentions that the note is valueless because it is unmarketable, it is clear that the sale of the treasury shares brought a valuable income-producing asset—the Ogden note—into Buffalo Forge's treasury.

Finally, pursuant to New York Business Corporation Law § 504(e), the directors were entitled to fix the consideration to be received for the treasury shares. Pursuant to New York Corporation Law § 505(h), the directors' judgment as to the adequacy of the consideration received for the grant of the option was conclusive, absent fraud, of which there is no evidence.

Furthermore, with respect to New York Business Corporation Law § 717, the directors were entitled to rely on the advice of Kidder that the transaction with Ogden, including the sale of the treasury shares and grant of the option, was fair to the corporation and, on the advice of Skadden Arps and Lord Day, that the transaction was legal, valid, and proper and in compliance with the directors' fiduciary responsibilities.

Ogden purchased the treasury shares in good faith for value and without notice of any adverse claim. Ogden is thus entitled

to the status of a bona fide purchaser of the treasury shares, New York Uniform Commercial Code §§ 8-301, 8-304, and is entitled to payment for the shares.

The Ogden-Buffalo Forge transaction, pursuant to which Ogden acquired the treasury shares, was not in any event a manipulative practice forbidden by section 14(e) of the 1934 Act. The record shows that neither Ogden nor Buffalo Forge intended the sale of the treasury shares and grant of the option to foreclose additional bidding, either by Ampco or by third parties.

Contrary to Ampco's argument that the sale of the stock and the grant of the option constituted an unlawful attempt to circumvent the requirement that two-thirds of Buffalo Forge's shareholders approve a merger between Buffalo Forge and Ogden, the court finds that the Merger Agreement was not, in itself, a plan of merger which required shareholder approval but was a contract to create a merger plan. The merger agreement contemplated preparation of a "plan of merger," which was thereafter to be submitted to the shareholders for a vote (*see* New York Business Corporation Law §§ 902, 903(a)), but neither the merger agreement nor the related transactions to which it referred (such as the treasury stock sale) were a "plan of merger" which, by law, must be submitted for shareholder approval, and New York law does not require shareholder approval of a sale of treasury shares.

Similarly, there is no evidence that the Individual Defendants sold the treasury stock to influence the shareholder vote on the Ogden merger proposal. They sold the treasury stock because it was a necessary prerequisite to obtaining Ogden's $32.75 offer.

The court also rejects plaintiffs' antitrust claims. Neither an agreement to purchase stock nor an agreement to terms of merger is an agreement to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Finally, the court finds that the sale of the treasury shares does not constitute a violation of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). The actions in dispute in the case at bar simply do not constitute the kind of manipulative, "lock-

up" device found to be unlawful by the United States Court of Appeals for the Sixth Circuit in the case of *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981).

In *Mobil*, the court found that an option for the sale of certain key corporate assets made by the target corporation to one of two competing tender offerers violated section 14(e) because the option contract was intended to, and did, foreclose competitive bidding for control of the corporation, dramatically depleting its value by the sale of corporate assets.

In this case, the record shows that neither Ogden nor Buffalo Forge intended the sale of the treasury shares and the grant of the option to foreclose additional bidding, either by Ampco or by third parties. And, in fact, the sale of the treasury shares did not foreclose competitive bidding, but rather stimulated it. Moreover, the court agrees with the defendants that Ampco does not have standing to seek rescission of the merger agreement. It is true, as Ampco argues, that section 29(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78cc(b), expressly provides that:

> (b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder . . . shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract . . . .

Under section 29(b), only an "unwilling innocent party" to a contract may attack it. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 387, 90 S.Ct. 616, 623, 24 L.Ed.2d 593 (1970). Buffalo Forge willingly entered into the questioned contract and knew of all the facts which Ampco now claims constitute "manipulation," and thus, it may not invoke the provisions of section 29(b) to challenge the contract. *Palmer v. Thomson & McKinnon Auchincloss, Inc.*, 474 F.Supp. 286, 291 (D.Conn. 1979); *Drasner v. Thomson McKinnon Securities, Inc.*, 433 F.Supp. 485, 502 (S.D.N.Y.1977).

V. Summation

The court finds that Ampco has not met its burden of showing that a majority of the directors of Buffalo Forge acted in bad faith or from self-interest in approving the February 8 Merger Agreement with Ogden. Even if the plaintiffs had succeeded in rebutting the presumption of good faith which attaches to the actions of corporate directors, there is nothing to indicate that the sale of the treasury stock should be rescinded because it was not "fair" to the corporation. *See Treadway v. Care Co., supra* at 382.

The court finds that rescission is not a proper remedy in any event, because there is nothing to indicate that the other party to the contract, Ogden, was guilty of wrongdoing.

Ogden validly tendered the 425,000 shares to Ampco on March 9, 1981, and is entitled to payment for them at the tender price of $37.50 in cash per share, or $15,937,500.00.

Ogden validly acquired an option to purchase an additional 143,400 shares on February 8, 1981, and validly exercised that option on January 5, 1982.

Pursuant to the Ampco-Buffalo Forge merger agreement, Ogden is entitled to receive $37.50 in cash for each of the 143,400 shares as to which the option has been exercised, or $5,377,500.00.

Upon Buffalo Forge's declaration of a dividend payable March 31, 1981, Ogden became a creditor of Buffalo Forge in the amount of the unpaid dividend and is entitled to the payment of that amount, $116,875.00, with interest.

The only remaining issue for decision by this court is the proper determination of which rate of interest to apply to the delayed transfer of stock. Ogden advocates that payment be made with prejudgment interest at prime rate. Ampco argues that the statutory directive limits payment to either 6 percent or 9 percent.

Although the United States Court of Appeals for the Second Circuit has eschewed the practice of allowing crafty litigators the option of further appeal to avoid a debt's higher market interest rate, that cited authority does not apply to the instant

case. *Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361 (2d Cir.1981). The court in *Bankers Trust* was apparently bound to allow the statutory rate but imposed fees and double costs, for the facts of that case revealed a concerted effort on the part of appellants to delay payment. *Id.* at 1367-68. Certainly, the present case describes no extenuating factors which would prompt this court to avoid the applicable statute, New York C.P.L.R. § 5004 (amend.1972 and amend.1981) (McKinney Supp.1981).

The interest rate was raised, effective June 25, 1981, from 6 percent per annum to 9 percent per annum. C.P.L.R. § 5004 (amend.1981). The interest shall therefore be computed in accordance with the directives of C.P.L.R. § 5001(b) (McKinney Supp.1981); *United Bank Ltd. v. Cosmic Intern., Inc.*, 542 F.2d 868, 878 (2d Cir.1976).

Although Ogden asserts that equitable claims under section 14(e) would remove the statutory interest restriction, this court is unpersuaded that such a position applies here. Ogden refers to *Osofsky v. Zipf*, 645 F.2d 107 (2d Cir.1981), but that case involved a fraudulent tender offer, which does not apply to the present case. C.P.L.R. § 5001(a).

It appears that the parties can best compute the arithmetical amounts to properly reflect the directives of this court. The parties are directed to do so by affidavits filed within 15 days of the date of this order, and to prepare and submit a proposed judgment in accordance with this order and decision.

So ordered.